PP v. AMBIKA M A SHANMUGAM

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
ABU BAKAR JAIS JCA
NORDIN HASSAN JCA
[CRIMINAL APPEAL NO: P-05(LB)-215-04-2019]
8 DECEMBER 2020

CRIMINAL PROCEDURE: *Trial – Discontinuance – Murder – Prosecution discontinued trial and applied for accused to be discharged not amounting to an acquittal ('DNAA') – Trial judge proceeded to acquit and discharge accused amounting to acquittal ('DAA') – Appeal against decision of trial judge – Whether court could acquit and discharge accused pursuant to s. 254(3) of Criminal Procedure Code – Whether trial judge correct in exercising discretion to direct an acquittal against accused – Whether there was failure to consider power of Public Prosecutor under art. 145 of Federal Constitution and s. 376 of Criminal Procedure Code in determining conduct of criminal prosecutions*

STATUTORY INTERPRETATION: *Construction of statutes – 'unless the court so directs' – Criminal Procedure Code, s. 254(3) – Intention of Parliament – Whether court given discretionary power to direct for discharge amounting to acquittal – Whether discretion to be exercised judiciously*

The respondent was charged for murder under s. 302 of the Penal Code in the High Court. The trial against the respondent had commenced and the prosecution had called several witnesses to testify. Thereafter, on the date of the continuation of the trial, the Deputy Public Prosecutor ('DPP') informed the trial judge that she was asking for the respondent to be discharged not amounting to an acquittal ('DNAA') pursuant to s. 254 of the Criminal Procedure Code ('CPC'). Having considered the circumstances of the case, including the fact that no reason was given for the case to be DNAA, the trial judge had acquitted and discharged the respondent from the charge against her. Before this decision was made by the trial judge, the respondent had written a representation to the Attorney General by letter for the charge against the respondent to be dropped. In response, the Solicitor General III, on behalf of the Attorney General Chambers, had accepted the representation and agreed not to proceed with the prosecution of the respondent pursuant to s. 254 of the CPC. The main ground of this appeal was against the discharge amounting to an acquittal ('DAA') order made by the trial judge. It was the appellant's submission that the trial judge had failed to consider the power of the Public Prosecutor under art. 145 of the Federal Constitution and s. 376 of the CPC in determining the conduct of criminal prosecutions when the trial judge acquitted and discharged the respondent pursuant to s. 254(3) of the CPC. The issues that arose were (i) whether the court could

A acquit and discharge an accused person pursuant to s. 254(3) of the CPC; and (ii) whether the trial judge was correct in exercising his discretion to direct an acquittal against the respondent from the charge proffered against her.

Held (dismissing appeal)
Per Nordin Hassan JCA delivering the judgment of the court:

B

(1) The phrase 'unless the court so directs' in s. 254(3) of the CPC is plain and clear which should be given its literal meaning. It clearly means that although the discharge shall not amount to an acquittal but the court is also given the discretionary power to direct for discharge amounting to an acquittal. Further, Parliament does not act in vain by inserting the phrase 'unless the court so directs' if its intention in enacting s. 254(3) is not to give the discretion to the courts to discharge an accused person amounting to an acquittal. The phrase would then be otiose or redundant. Therefore, the court is vested with the discretionary power to direct an acquittal of an accused person pursuant to s. 254(3) of the CPC and certainly this discretion is to be exercised judiciously. (paras 14, 16 & 20)

C

D

(2) The prosecution had decided not to proceed with the prosecution against the respondent and this decision was conveyed to the respondent by a letter. There was no issue of the prosecution having temporary impediment to proceed with the prosecution of the case. In fact, the prosecution had agreed for the charge against the respondent to be dropped. As such, there were no good grounds available for the prosecution to ask for the case to be DNAA. (para 25)

E

F

(3) This court acknowledges the Public Prosecutor's power in the control of all prosecutions as envisaged under art. 145 of the Federal Constitution and s. 376 of the CPC. However, the issue here was with regard to the discretionary power of the court either to direct a discharge not amounting to an acquittal or a discharge amounting to an acquittal pursuant to the power conferred under s. 254(3) of the CPC. The exercise of this discretionary power must not be seen as infringing or whittling down the power and authority of the Public Prosecutor. The decision of the trial judge in acquitting the respondent was correct and he had exercised his discretionary power in accordance with the law. (paras 27 & 28)

G

H

Case(s) referred to:
Goh Cheng Chuan v. PP [1990] 1 LNS 85 HC ***(refd)***
Koh Teck Chai v. PP [1967] 1 LNS 72 HC ***(refd)***
Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***
Mohamed Kanathi Meerah Mydin v. PP [2019] 2 CLJ 28 CA ***(refd)***

I *PP v. Mat Zain [1948-49] MLJ Supp 142* ***(refd)***

PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
PP v. Syed Abdul Bahari Shahabuddin [1975] 1 LNS 137 HC ***(refd)***
PP v. Zainuddin Sulaiman & Ors [1986] 1 CLJ 468; [1986] CLJ (Rep) 232 SC ***(dist)***
Tan Ah Chan v. Regina [1955] 1 LNS 155 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 254(3), 376
Federal Constitution, art. 145
Penal Code, s. 302

Criminal Procedure Code [Sing], s. 184(2)

For the respondent - Anbananthan Yathiraju; M/s Anba & Assocs
For the appellant - Dasuki Mokhtar & Nurshafini Mustafha; DPPs

[Editor's note: For the High Court judgment, please see PP v. Ambika M A Shanmugam [2019] 7 CLJ 518 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nordin Hassan JCA:

Introduction

[1] On 18 April 2019, the Penang High Court Judge had acquitted and discharged the respondent for an offence under s. 302 of the Penal Code ('PC"). The decision was made after the Deputy Public Prosecutor had requested the case against the respondent to be discharged not amounting to an acquittal ("DNAA") pursuant to s. 254 of the Criminal Procedure Code ("CPC"). The present appeal is against the discharge amounting to an acquittal ("DAA") order made by the judge.

[2] The charge against the respondent reads as follows:

> Bahawa kamu pada 10 Februari 2018, jam lebih kurang 4.00 petang, di No.67, Medan Kota Permai 2, Taman Kota Permai 2, Bukit Mertajam di dalam Daerah Seberang Perai Tengah, Dalam Negeri Pulau Pinang, telah melakukan bunuh dengan menyebabkan kematian ke atas Adelina Lisao, warganegara Indonesia, No. Paspot A4725964. Oleh itu, kamu telah melakukan satu kesalahan yang boleh dihukum dibawah seksyen 302 Kanun Keseksaan.

Background Facts

[3] The relevant facts for the purpose of this appeal are the following. The respondent was charged for murder under s. 302 of the PC in the High Court of Penang. The trial against the respondent had commenced and the prosecution had called three witnesses to testify. They were the science officer at the Chemistry Department, PW1, and two reporters, PW2 and PW3. Thereafter, on the date of the continuation of the trial, the Deputy Public Prosecutor ("DPP") informed the trial judge that she is asking for the case to be DNAA upon instruction received from her superior.

[4] Although the trial judge had asked several times as to the reason for the application to DNAA the case, the DPP had failed to give any reason. This is reflected in the notes of proceedings at pp. 46 and 47 which are as follows:

> TPR : untuk kes ini terdapat representasi yang dimasukkan oleh pihak peguam. Saya ingin kes ini diDNAA di bawah seksyen 254 CPC.
>
> Mahkamah : Kenapa?
>
> TPR : Atas arahan.
>
> Mahkamah : Kenapa DNAA? Nak tarik balik tuduhan ke tak mahu teruskan ke. Apa alasan?
>
> TPR : Arahan kepada saya adalah untuk memohon DNAA, Yang Arif.
>
> Mahkamah : *tidak mahu meneruskan pendakwaan?*
>
> TPR : *Ya, Yang Arif, setakat ini.*
>
> Mahkamah : Arahan untuk tidak meneruskan pendakwaan ini?
>
> TPR : Arahan untuk DNAA dahulu.
>
> Mahkamah : Mesti ada sebab. Peguambela ada apa-apa hendak kata?
>
> Peguambela : Memandangkan arahan telah diperolehi.
>
> Mahkamah : Setuju dengan DNAA atau tidak?
>
> Peguambela : Tidak, Yang Arif. Memandangkan mereka tidak ingin teruskan perbicaraan pada hari ini, saya percaya mereka menggunakan seksyen 254 CPC, saya pohon budibicara Mahkamah untuk menggunakan seksyen 254(3) di mana Mahkamah mempunyai budibicara mutlak dalam menentukan sama ada kes ini dilepaskan dan dibebaskan. Untuk makluman Mahkamah beberapa representasi telah pun dihantar kepada pihak Pendakwaan. Saya percaya this is the deserving case. Saksi telah memberi keterangan. There is no evidence at all in use. This case saksi telah memberi keterangan pada peringkat ini arahan untuk tidak diteruskan DNAA. Therefore, I'm praying to my Lord to use section 254(3) given acquittal from the trial. Looking at the age, actually she is about 65 and health conditions as well. Pohon pertimbangan dan budibicara Mahkamah untuk melepaskan dan membebaskan OKT.
>
> Mahkamah : Dalam kes ini oleh kerana DPP tak boleh bagi sebab mengapa tidak mahu teruskan, adalah tidak adil kalau the charge is hanging on the head of the accused. Kalau DNAA bila-bila masa depan dia boleh dituduh balik. *Tetapi kalau ada alasan yang munasabah untuk pertimbangan mahkamah kenapa nak DNAA, saya boleh pertimbangkan. Dalam kes ini tidak ada apa-apa alasan untuk mempertimbangkan DNAA.* Jadi saya setuju dengan peguambela, tertuduh ini dilepaskan dan dibebaskan atas tuduhan terhadapnya. Acquittal and discharged.
>
> (emphasis added)

[5] Clearly, on 18 April 2019, having considered the circumstances of the case including the fact that no reason was given for the case to be DNAA, the trial judge had acquitted and discharged the respondent from the charge against her.

[6] Before this decision was made by the trial judge, counsel for the respondent wrote a representation to the Attorney General by letter dated 4 April 2019 for the charge against the respondent to be dropped. The said letter is reproduced below:

& ASSOCIATES
...ates & Solicitors
...ambela & Peguamcara

...ANBANANTHAN YATHIRAJU
Bachelor of Jurisprudence, CLP

LEGAL ASSISTANT:
TISHALINI NAGANATHAN
LLB (HONS). UUM

No. 7, 2nd Floor,
Lorong Jermal Indah,
Taman Jermal Indah,
12300 Butterworth, Penang.
Tel : 04-3313257
Fax : 04-3313357
Email : anbakani@gmail.com

Please quote our reference in all correspondences

☐ BY FAX / EMAIL
☐ BY HAND / DESPATCH
☐ COURIER
☐ POST / AR REGISTERED

Your Ref :
Our Ref : A/CRI/AMS/170-18
Date : 04/04/2019

Office Hours : Monday - Friday
8.30 am -5.30 pm

The Honourable Tuan Tommy Thomas
Attorney General of Malaysia
Attorney General Chambers
No.45, Persiaran Perdana,
Precint 4, 62100 Putrajaya,
Wilayah Putrajaya, Malaysia.

TEL: 03-8872 2000
FAX: 03-8890 5609
EMAIL: ag.thomas@agc.gov.my

Dear Sir,

RE: ADDITIONAL REPRESENTATION (3)
HIGH COURT OF MALAYA AT PENANG
CRIMINAL TRIAL CASE NO:PA-45B-9-10/2018
PUBLIC PROSECUTOR VS AMBIKA A/P M.A SHANMUGAM
SECTION: 302 PENAL CODE
HEARING DATE: 11,12, & 18 APRIL 2019

We refer to the above matter and to our previous representations dated 17/12/2018 and 27/09/2018 respectively.

2. Upon our perusal of documents that were served to us on 12/03/2019 pursuant to s.51A Criminal Procedure Code, particularly a document named as ***"Kementerian Kesihatan Malaysia Surat Rujukan"*** **dated 11/02/2018** (hereinafter will be referred to as "Surat Rujukan") proves that the victim (hereinafter will be referred to as "the deceased") stated ***"...she denies that anyone was beating / abusing her..."***.

S/N 9XBULW5ol0CH7dXRhyRD6g 1
**Note : Serial number will be used to verify the originality of this document via eFILING portal

MESSRS ANBA & ASSOCIATES
OUR REF: A/CRI/AMS/170-18

DATE: 04/04/2019

3. Further, it is evident from the perusal of the said "Surat Rujukan" that the deceased had also stated as follows, ***"...claims was washing toilet bowl with acid solution. When she flashed the toilet bowl, the solution splashed and hit her bilateral upper and lower limbs..."*** (hereinafter will be referred to as "the incident of washing the toilet bowl"). With reference to the diagram drawn by the Medical Officer, namely Dr. Daveenjit Singh a/l Ranjit Singh at page 3 of the said "Surat Rujukan", it is clear that the injuries sustained by the deceased particularly on her bilateral upper limbs, bilateral lower limbs and also perineal region corroborates the deceased's statement as to the incident of washing the toilet bowl. **(Attached herewith a copy of "Surat Rujukan Kementerian Kesihatan Malaysia" for your kind attention and perusal).**

4. The deceased's confession to the doctor as to how she sustained the injuries, eliminate the element of causal link that the accused is the one who caused the bodily injuries sustained by the deceased (if any).

5. Further, Malaysian Immigration Department's confirmation also proves that the deceased was illegally brought and/or entered Malaysia and two Malaysian individuals namely, **Siti Rahaida Binti Daud (NRIC NO: 840111-07-5016)** and **Lim Ching Ling (NRIC NO: 740520-07-5430)** who were engaged in recruiting the deceased, were charged in the Bukit Mertajam, Pulau Pinang Magistrate Court under s. 55B of the Immigation Act 1959 who subsequently pleaded guilty and upon conviction paid fine a sum of RM10,000,00 each. **(Attached herewith a copy of Malaysian Immigration Department's confirmation dated 14/02/2018 and two (2) charge sheets for your kind attention and perusal).**

6. The cause of death of the deceased was due to **Multiorgan Failure Secondary to Anemia** in which the deceased internal organs were exposed to bacteria which causes the deceased suffered multiple organ failure and thereafter this resulted her death. **No documentary evidence was produced in support of as to the health of the deceased such as FOMEMA confirmation whether the deceased as a foreign employee is medically fit to work and free from any disease and/or sickness.** The absence of such material and/or significant medical documents creates a gap in the prosecution's case which raises reasonable doubts as to the health condition of the deceased before she commenced work with the accused. As a result, a number of inferences can be drawn which are as follows: -

S/N 9XBULW5cf0CH7dXRhyRD6g
**Note : Serial number will be used to verify the originality of this document via eFILING portal

MESSRS ANBA & ASSOCIATES **DATE: 04/04/2019**
OUR REF: A/CRI/AMS/170-18

I. Whether the deceased was in a good health before she starts work for the accused?

II. Whether the deceased could have been exposed herself in the dangerous, poisonous, and hazardous working environment before she commences work with the accused?

III. Whether the deceased suffered any chronic and/or serious disease before enters Malaysia?

6. Based on the foregoing reasons we would like to seek your kind indulgence that the charge framed against the accused person to be dropped.

Your cooperation and consideration in this matter is highly appreciated.

Yours sincerely,

anba&associates

.....
MESSRS ANBA & ASSOCIATES

C.c **Pengarah Pendakwaan Negeri**
Pejabat Penasihat Undang-Undang Negeri Pulau Pinang
Aras 10, Bangunan Persekutuan,
Jalan Anson, 10400 Pulau Pinang.
TEL:04-2272913
FAX:04-2276045
EMAIL: yusaini @agc.gov.my
[Attn: Mr. Yusaini Amer bin Abdul Karim]

S/N 9XBULW5of0CH7dXRhyRD6g
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[7] In response, the Solicitor General III, on behalf of the Attorney General Chambers, by letter dated 16 April 2019, had accepted the representation and agreed not to proceed with the prosecution of the respondent pursuant to s. 254 of the CPC. The letter of response is as follows:

JABATAN PEGUAM NEGARA, MALAYSIA (AGC)
ATTORNEY GENERAL'S CHAMBERS, MALAYSIA (AGC)
No. 45, Persiaran Perdana
Presint 4
62100 PUTRAJAYA
MALAYSIA

Tel: 03-8872 2000
Faks (Fax): 03-8890 5870
Laman Web (Web): www.agc.gov.my

Ruj. Kami : PN(SGIII)152-1/2
Tarikh : 16 April 2019

Tetuan ANBA & Associates,
No. 7, 2nd Floor, Lorong Jermal Indah
Taman Permai Jermal Indah
12300 Butterworth
PULAU PINANG.

Tuan,

RE : ADDITIONAL REPRESENTATION (3)
HIGH COURT OF MALAYA AT PENANG
CRIMINAL TRIAL CASE NO:PA-45B-9-10/2018
PUBLIC PROSECUTOR VS AMBIKA A/P M.A SHANMUGAM
SECTION : 302 PENAL CODE
HEARING DATE : 1,12 & 18 APRIL 2019

Dengan hormatnya perkara di atas dan surat Tuan yang bertarikh 4 April 2019 dirujuk.

2. Sila maklum bahawa setelah menyemak dan mengkaji kes secara teliti dan dilihat dari sudut keterangan dan undang-undang, representasi pihak Tuan dibenarkan. Pendakwaan terhadap anak guam Tuan tidak akan diteruskan di bawah seksyen 254 Kanun Prosedur Jenayah.

Sekian terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menjalankan amanah,

(DATO' MOHAMAD HANAFIAH BIN ZAKARIA)
Peguam Cara Negara III
Jabatan Peguam Negara

s.k Pengarah Pendakwaan Pulau Pinang

RECEIVED
23 APR 2019
ANBA & ASSOCIATES
Advocates & Solicitors

BERTEKAD MENEGAKKAN KEADILAN
STEADFAST IN UPHOLDING JUSTICE

S/N 9XBULW5of0CH7dXRhyRD6g
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[8] The letter from the Attorney General Chambers dated 16 April 2019 was received by the respondent's counsel on 23 April 2019.

The Appeal

[9] The main ground of appeal by the appellant in the present case is that the trial judge had failed to consider the power of the Public Prosecutor under art. 145 of the Federal Constitution and s. 376 of the CPC in determining the conduct of criminal prosecutions when the trial judge acquitted and discharged the respondent pursuant to s. 254(3) of the CPC.

[10] The appellant further submitted that the trial judge had erred in fact and in law when he failed to consider the principle laid down by the Supreme Court in *PP v. Zainuddin Sulaiman & Ors* [1986] 1 CLJ 468; [1986] CLJ (Rep) 232; [1986] 2 MLJ 100.

Our Deliberation And Decision

[11] The present appeal centered primarily on the interpretation and application of s. 254 and in particular s. 254(3) of the CPC which merit reproduction.

> **Public Prosecutor may decline to prosecute further at any stage**
>
> 254 (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
>
> (2) At any stage of any trial before a Sessions Court or a Magistrate Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.
>
> (3) Such discharge shall not amount to an acquittal **unless the Court so directs.** (emphasis added)

[12] The learned DPP submitted that the trial judge has no power to acquit and discharge the respondent pursuant to the above s. 254. Instead, the trial judge should only DNAA the case as requested by the DPP handling the trial. The DPP relied heavily on the power of the Public Prosecutor under art. 145 of the Federal Constitution and s. 376 of the CPC where the handling of criminal prosecutions is vested with the Public Prosecutor and not the court. The Federal Court case of *PP v. Zainuddin & Anor* (*supra*) was cited to support his contention on this issue.

Whether The Court Can Acquit And Discharge An Accused Person Pursuant To Section 254(3) Of The CPC

[13] The initial pertinent issue here is whether the court has the power to acquit an accused person pursuant to s. 254(3) which provides:

> (3) Such discharge shall not amount to an acquittal **unless the Court so directs**

[14] The phrase "unless the court so directs" in s. 254(3) is plain and clear which should be given its literal meaning. It clearly means that although the discharge shall not amount to an acquittal but the court is also given the discretionary power to direct for discharge amounting to an acquittal.

[15] On the interpretation of the statute which is plain and unambiguous, it is instructive to make reference to the Federal Court case of *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82; [1980] 2 MLJ 273, where Suffian LP (when he then was) said this:

> the words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd. v. Sirs* seems to me to be particularly apt, for "the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. *Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.*
>
> (emphasis added)

[16] Further, Parliament does not act in vain by inserting the phrase "unless the court so directs" if its intention in enacting s. 254(3) was not to give the discretion to the courts to discharge an accused person amounting to an acquittal. The phrase will then be otiose or redundant.

[17] The Federal Court in *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94, had addressed the same issue in the following words:

> The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words or phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant.* It must borne in mind that:
>
> As a general rule a Court will adopt the construction of a statute which will give some effect to all of the words which it contains.
>
> (Per Gibbs J in *Beckwith v. R* [1976] 12 ALR 333, at p. 337)
>
> (emphasis added)

[18] Further, the meaning of the phrase "unless the court so directs" had been dealt with by the Singapore High Court in the case of *Goh Cheng Chuan v. PP* [1990] 1 LNS 85; [1990] 3 MLJ 401. The provision of s. 184(2) of the Singapore's CPC has the similarity with s. 254(3) of our CPC and Thean J in that case explained and opined as follows:

> I now turn to s. 184(2) of the Criminal Procedure Code and, in particular the construction of the words, *'unless the court so directs'*. The learned district judge took the view that these words do not confer on the court an unfettered discretion and that the exercise of such discretion is limited or restricted to broadly two categories; first, where the prosecution specifically withdraws the charge or has signified its consent to the acquittal of the accused on the charge and, secondly, those instances as provided in section 180 (then s. 179) of the Criminal Procedure Code where the court finds that no case has been made out against the accused: s. 180(f); or that the charge against the accused is groundless; s. 180(g); or that the charge has not been proved: s. 180(n)(i).
>
> …
>
> The learned district judge therefore gave to the words, 'unless the court so directs' a limited and narrow construction: in his view, having regard to the role of public prosecutor under the Criminal Procedure Code, the exercise of the discretion as conferred by those words is confined to the specific instances indicated by him ...
>
> …
>
> I now revert to s. 184(2) of the Criminal Procedure Code. *With respect, I am unable to agree with the learned district judge on the limited and narrow construction he placed on the words, 'unless the court so directs', in s. 184(2). The words are unambiguous and clear, and effect must be given to them: they give to the court an unfettered discretion to direct in appropriate circumstances, that the discharge shall amount to an acquittal. Section 184 subsist independently on its own, its scope or operation is not limited by s. 180 or other provision of the Criminal Procedure Code or other provision of the Criminal Procedure Code. There is no justification for holding that the court can only exercise such discretion in the instances enumerated in s. 180 of the Criminal Procedure Code or when the prosecution informs the court that it will not further prosecute the accused and, in addition, signified its consent to an acquittal of the accused.*
>
> Where the prosecution has instituted against an accused on a charge, the decision whether or not to prosecute further the accused on the charge is one for the prosecution to make. Once he has made the decision not to prosecute the accused further, he ought in conformity to that section to inform the court of his decision and s. 184(1) comes into operation. For the purpose of s. 184(2) he ought further to inform the court of all relevant matters, for example, as in this case, the difficulty of tracing a material witness and his intention as to the likelihood of future prosecution of the accused on the charge. It is then for the court to decide whether it should direct that the discharge shall amount to an acquittal. *The court is vested with*

A *the discretion is, in my opinion, unfettered; but, of course, it must be exercised judicially, taking into consideration all the relevant facts and factors placed before it, including the intention of the public prosecutor as to the future prosecution of the accused on the charge. That, in substance, is how the section operates.*

I am in complete agreement with what Lai Kew Chai J said in *Abdul Rasheed* at p 195:

B *Subsection [184(2)] begins with the proposition of law that such discharge shall not amount to an acquittal, followed by the crucial words 'unless the court so directs …' I need not refer to cases coming within s. 176 of the Code as they are irrelevant for present purposes. These crucial words plainly confer on the court the discretionary power to direct an acquittal and the power arises the moment the prosecution informs*

C *the court that it is not going on with the prosecution of the defendant upon the charge, whether or not the prosecution has decided forever to withdraw the charge.*

(emphasis added)

[19] The discretionary power to direct an acquittal pursuant to s. 254(3) is also recognised by this court in the case of *Mohamed Kanathi Meerah Mydin*

D *v. PP* [2019] 2 CLJ 28 where it states:

[39] ***We observed that even though the learned trial judge had a*** *discretionary power to direct an acquittal under sub-s. 254(3) of the CPC,* ***nevertheless he did not exercise his discretionary power in the instant case*** …

E There is ample persuasive authority for the proposition that unless some good grounds are shown, it would not be right to leave PW1 saddled with a charge hanging over his head for an indeterminate period. However, PW1 himself did not apply for a discharge amounting to an acquittal. (*K Abdul Rasheed v. PP* [1985] 1 LNS 54; [1985] 1 MLJ 193).

(emphasis added)

F **[20]** Therefore, based on the interpretation of s. 254(3) and the authorities cited above, it is also our view that the court is vested with the discretionary power to direct an acquittal of an accused person pursuant to s. 254(3) of the CPC and certainly this discretion is to be exercised judiciously.

G *Whether The Trial Judge In The Present Case Was Correct In Exercising His Discretion To Direct An Acquittal Against The Respondent From The Charge Proffered Against Her*

[21] In relation to this issue, the crucial fact is the contents of the letter dated 16 April 2019 from the Attorney General's Chambers to the

H respondent's counsel in response to the representation made by the respondent. The letter clearly states that the prosecution against the respondent will not be proceeded pursuant to s. 254 of the CPC. The letter also indicated that the representation for the charges against the respondent to be dropped was accepted. The relevant parts of the said letter are as

I follows:

> … Setelah menyemak dan mengkaji secara teliti dan dilihat dari sudut keterangan dan undang-undang, **representasi pihak Tuan adalah dibenarkan.** Pendakwaan terhadap anak guam Tuan **tidak akan diteruskan** dibawah seksyen 254 Kanun Prosedur Jenayah.
>
> (emphasis added)

[22] The decision not to proceed with the prosecution of the respondent was made two days before the decision by the trial judge to acquit the respondent on 18 April 2019. On this ground alone, the exercise of the trial judge's discretionary power to order an acquittal against the respondent is justified. There is no valid reason for the prosecution to apply for the case to be DNAA when it has been decided that the charges against the respondent are to be dropped.

[23] It is also a trite principle of law that the prosecution must show good grounds in order to obtain a discharge not amounting to an acquittal pursuant to s. 254(3) of the CPC.

(see *Mohamed Kanathi* (*supra*); *PP v. Mat Zain* [1948-49] MLJ Supp 142; *Tan Ah Chan v. Regina* [1955] 1 LNS 155; [1955] 1 MLJ 218; *Koh Teck Chai v. Public Prosecutor* [1967] 1 LNS 72; [1968] 1 MLJ 166).

[24] Further, in *PP v. Syed Abdul Bahari Shahabuddin* [1975] 1 LNS 137; [1976] 1 MLJ 87, Abdoolcader J said this:

> … Sub-section (iii) of section 254 specifically enacts that a discharge under that section shall not amount to an acquittal unless the court so directs. *It is settled* law that unless there are good grounds to the contrary, a discharge under *this provision should amount to an acquittal. Good grounds for a discharge not amounting to an acquittal would arise where the prosecution is unable to proceed for the time being but can satisfy the court that the temporary impediment is not unsurmountable and that it will proceed within a reasonable time. This seems to be the raison d'etre for the scheme providing for a discharge not amounting to an acquittal.* (emphasis added)

[25] In the instant case, the prosecution had decided not to proceed with the prosecution against the respondent and this decision was conveyed to the respondent's counsel by the letter dated 16 April 2019. There is no issue of the prosecution having temporary impediment to proceed with the prosecution of the case. In fact, the prosecution had agreed for the charge against the respondent to be dropped. As such, there is no good grounds available for the prosecution to ask for the case to be DNAA.

[26] The decision in the Supreme Court case of *PP v. Zainuddin* (*supra*) cited by the appellant can be distinguished on its facts. In that case, the prosecution had not indicated or decided not to proceed with the prosecution against the accused person. The accused was acquitted by the Magistrate as the trial had been postponed for several times. Further, the prosecution intended to

A proceed with the prosecution of the accused and had made an application for a review against the decision of the Magistrate in acquitting the accused. Clearly the facts in *PP v. Zainuddin* are poles apart from the present case.

[27] We have to state here that we acknowledged the Public Prosecutor's power in the control of all prosecutions as envisaged under art. 145 of the B Federal Constitution and s. 376 of the CPC. However, the issue here is with regard to the discretionary power of the court either to direct a discharge not amounting to an acquittal or a discharge amounting to an acquittal pursuant to the power confers under s. 254(3) of the CPC. The exercise of this discretionary power must not be seen as infringing or whittling down the C power and authority of the Public Prosecutor.

[28] In conclusion, we find, the decision of the trial judge in acquitting the respondent was correct and he had exercised his discretionary power in accordance with the law. Therefore, the appeal by the appellant is dismissed and the decision of the High Court Judge is affirmed.

D

E

F

G

H

I